



October 18, 2002

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-5907

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170971.

The City of Austin (the "city") received a request for information related to RFP No. LI02300106, including the proposal evaluation matrix, and all submitted proposals. You state that, to the extent it exists, information in the proposals that was not marked proprietary has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. In addition, pursuant to section 552.305, you indicate that you notified the parties with a proprietary interest in the information of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

¹The third parties that were sent notice under section 552.305 are the following: Rogers Environmental & Safety Services, Marsh USA, Inc., Gallagher Bassett Services, Inc., and Framatome, ANP DE&S.

Initially, we note that you did not submit a proposal evaluation matrix for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302.

We first address the exceptions raised by the city. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, and also encompasses the doctrines of common-law and constitutional privacy. Upon review of the submitted information, we are unaware of any law that would make this information confidential, nor do you argue that any specific law is applicable, other than section 552.110. Therefore, we find that the submitted information is not excepted under section 552.101.

We next address the applicability of section 552.110 to the requested information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing,

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

Upon review of the arguments you submitted to this office, we conclude that the city has not demonstrated how any of the submitted information is excepted from disclosure as either a trade secret under section 552.110(a) or as commercial or financial information under section 552.110(b).

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code §552.305(d)(2)(B). No responses were received from Marsh USA, Inc. ("Marsh") or Framatome, ANP DE&S ("DE&S"). Because Marsh and DE&S did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that these companies' information is excepted from disclosure under section 552.110. See Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Responsive information of these two companies must, therefore, be released to the requestor.

Rogers Environmental & Safety Services ("Rogers") and Gallagher Bassett Services, Inc. ("Gallagher") responded to the notices and each asserted that section 552.110 of the Government Code excepts portions of its company's proposal from public disclosure.³ Rogers contends that certain information contained in its proposal is "proprietary," and that other information is "commercial or financial information, the disclosure of which would cause substantial competitive harm" to Rogers. In this instance, Rogers does not address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatements. See RESTATEMENT OF TORTS § 757 cmt. b (1939). Nor does Rogers explain how the requested information meets the Restatement definition of a trade secret. We therefore conclude that Rogers has not demonstrated that any of the information in question constitutes a protected trade secret under section 552.110(a) of the Government Code. We further find that Rogers has failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. Thus, we conclude that Rogers has not adequately

³We note that Rogers claims exceptions to the disclosure of its four page "Profit and Loss Statement," the section entitled "Safety Program Analysis and Consulting," and twelve pages of "Supporting Documentation." The city submitted only three pages of the "Profit and Loss Statement," and none of the other documents. We further note that Gallagher claims exceptions to Section D, E, and J of its proposal. The city did not submit Section D or J, and only submitted portions of Section E to this office. This ruling does not address the information that was not submitted to this office by the city.

demonstrated that its information either consists of trade secrets or would harm its competitive interests if released. Consequently, the submitted information in Rogers's proposal is not excepted from disclosure under section 552.110 and must be released.

Gallagher states that release of the information at issue would allow its competitors access to its means and methodologies, essentially giving competitors the benefit of Gallagher's resources for free. Gallagher also states that release of this information could damage the relationship of trust and confidence that Gallagher maintains with its clients, thereby putting Gallagher's credibility in the marketplace at issue and causing Gallagher a serious competitive disadvantage. Upon review of the arguments submitted by Gallagher, we conclude that Gallagher has established that release of its submitted information would result in substantial competitive injury. Therefore, the submitted portions of Section E of Gallagher's proposal must be withheld under section 552.110(b).⁴ As section 552.110(b) is dispositive as to the submitted information contained in Gallagher's proposal, we do not address Gallagher's claim under section 552.110(a).

In summary, the city must withhold the submitted portions of Section E of Gallagher's proposal under section 552.110(b). The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

⁴The following pages in Section E of Gallagher's proposal must be withheld: E-1; Table of Contents; pp. 1-2, 2-1, 2-3, 3-1, 3-3, 3-5, 3-7, 3-9, 3-11, 3-13, 3-15, 3-17, 3-19, 4-1, 4-3; Sample pp. 1, 3; and pp. 1-9 of the presentation. The city submitted no other portions of Section E for our review.

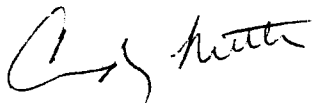
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 170971

Enc. Submitted documents

c: Ms. Hilary Styron
TriData Corporation
1000 Wilson Boulevard, 30th Floor
Arlington, Virginia 22209
(w/o enclosures)

Mr. Marc J. Wojciechowski
Wojciechowski & Associates, P.C.
2 Northpoint Drive, suite 725
Houston, Texas 77060
(w/o enclosures)

Ms. Kathi Rogers
Rogers Environmental & Safety Services
15701 Seattle Street
Houston, Texas 77040
(w/o enclosures)

Mr. Joe C. Tixier
Senior Counsel
Arthur J. Gallagher & Co.
The Gallagher Centre
Two Pierce Place
Itasca, Illinois 60143-3141
(w/o enclosures)

Mr. Doug Elder
Marsh USA Inc.
1221 South Mopac Expressway, Suite 350
Austin, Texas 78746
(w/o enclosures)

Mr. Calvin A. Banning, General Manager
Framatome, ANP DE&S
6100 Southwest Boulevard, Suite 400
Fort Worth, Texas 76109
(w/o enclosures)